IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-702

THOMAS ZARCONE,

Petitioner,

—against—

WILLIAM M. PERRY and JAMES WINDSOR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, PERRY

FRANCIS E. ZAKLUKIEWICZ
Counsel for Respondent,
William M. Perry
124 North Merrick Avenue
Merrick, New York 11566
(516) 623-1111

CURTIS, HART & ZAKLUKIEWICZ
EDWARD J. HART and
FRANCIS E. ZAKLUKIEWICZ
On the Brief

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT:	
Point I—The decision of the Court of Appeals in the instant case does not conflict with the other circuits	4
Point II—The decision of the Court of Appeals in the instant case does not conflict with the Supreme Court	6
Point III—There is no other basis on which to predicate a writ of certiorari	7
A. The Effectiveness of Private Civil Rights Actions Is Not Threatened	7
B. The Standards Governing the Award of Attorney's Fees Do Not Require Further Elucidation	9
CONCLUSION	11

Cases Cited

Alyeska Pipeline Co. v. *Wilderness Society*, 421 U.S. 240 (1975)	8, 10
Christiansburg Garment Co. v. *E. E. O. C.*, —— U.S. ——, 98 S. Ct. 694 (1978)	10
Hall v. *Cole*, 412 U.S. 1 (1973)	7

PAGE

Hughes v. *Repko*, 578 F.2d 483 (3d Cir., 1978) 5

Newman v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) 6, 10

Northcross v. *Memphis Board of Education*, 412 U.S. 427 (1973) 6

Sargeant v. *Sharp*, 579 F.2d 645 (1st Cir., 1978) 4, 5

Statute Cited

Civil Rights Attorney's Fees Awards Act of 1976 [amending 42 U.S.C. §1988 (1886)] 6, 7, 10

Other Authority Cited

S. Rep. 94-1011 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. and Admin. News 5909 et seq. 7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

THOMAS ZARCONE,

Petitioner,

—against—

WILLIAM M. PERRY and JAMES WINDSOR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, PERRY

Questions Presented

1. Whether a writ of certiorari should be issued to review the propriety of the discretionary denial of attorney's fees to a prevailing plaintiff whose counsel undertook to prosecute the claim under a contingent fee agreement.

This question should be answered in the negative.

2. Whether a writ of certiorari should be issued to afford an opportunity merely to coalesce the several standards concerning the awarding of attorney's fees in civil rights cases.

This question should be answered in the negative.

Summary of Argument

The decision of the Court of Appeals for the Second Circuit does not conflict with the decisions of other circuits. The cases relied on by petitioner do not contravene the standard used by the Court below; the results differed only because opposing facts were applied to essentially similar standards. There is, therefore, no conflict among the circuits.

Similarly, the decision below does not run contrary to decisions of the United States Supreme Court. The unique facts of the instant case takes it out of the general rule relied on by petitioner.

Finally, there is no other ground upon which to predicate a review of the instant case. The effectiveness of private civil rights actions remains as viable as it was before this decision; plaintiffs who cannot afford counsel will not be hampered in pursuing meritorious claims. Moreover, this case does not necessitate review merely to coalesce the existing standards referrable to the award of attorney's fees. To do so would essentially be an exercise in repetition.

For these reasons, the writ of certiorari should be denied.

Statement of Facts

Petitioner's statement of the facts underlying this case are, with few exceptions, essentially correct. Respondent respectfully seeks only to complete some aspects of the entire story.

While no formal evidentiary hearing was held prior to the Trial Court's denial of petitioner's application for attorney's fees, it should be noted that a full colloquy was held concerning that issue. The records reflects that Chief Judge Jacob Mishler afforded petitioner's counsel a more than adequate opportunity to present his arguments.

Moreover, the Court of Appeals for the Second Circuit expressly found that "there is not a sufficient showing in this record that [respondent] Perry acted in bad faith in defending this suit . . ." (petitioner's brief at A-13). Petitioner has not disputed that determination here; the ensuing argument is therefore based on the presumption that bad faith is not an arguable issue herein.

Finally, it should clearly be noted that at the outset of this lawsuit, petitioner retained counsel pursuant to a contingent fee arrangement wherein attorney and client were both very aware that any recovery would be split between them according to the percentages set forth by the retainer. Petitioner, by entering into the arrangement, implicitly acknowledged that two-thirds of his award —whatever the amount—would suffice to make him whole.

POINT I

The decision of the Court of Appeals in the instant case does not conflict with the other circuits.

Petitioner takes great pains to establish a viable reason why certiorari should be granted in the case at bar. One argument he raises is that a writ of certiorari should issue where there is conflict and confusion among the Circuit Court of Appeals. If there is any confusion created by the instant case, however, it does not exist within the circuits.

Petitioner cites two cases in his attempt to illustrate this conflict. The first of these is *Sargeant* v. *Sharp,* 579 F.2d 645 (1st Cir., 1978). In that case, the plaintiff was seeking declaratory and injunctive relief in addition to damages; the gravamen of her complaint centered on the harm she suffered as a result of a delay in the implementation of a Fair Hearing decision.

The Court of Appeals for the First Circuit reversed the Trial Court's determination that attorney's fees should not be awarded the plaintiff since she had entered into a contingent fee agreement with her attorney.

The Court of Appeals reversed the lower court specifically because no hearing on the record was held, and no reasons for denying the award of attorney's fees were given. While the Court considered the existence of a contingent agreement to be irrelevant, it stated that the Trial Court is vested with a broad latitude of discretion which should not be disturbed as long as the guidelines of procedural fairness are followed.

In substance, the First Circuit's position is that the Court must consider the movant's grounds for awarding attorney's fees, and of course, present the reasons on the record before the denial of attorney's fees will be upheld.

In the present case, the Second Circuit Court was not presented with this problem. Judge Mishler afforded petitioner's counsel a more than adequate opportunity to present his argument on the record; his decision, moreover, very carefully listed the grounds upon which he was denying the application for the award of attorney's fees. While the Second Circuit affirmed for other reasons, it cannot be maintained that petitioner was not extended the procedural fairness called for in the *Sargeant* decision.

Petitioner continues his argument that the circuits are in conflict by looking to a Third Circuit decision. In *Hughes* v. *Repko,* 578 F.2d 483 (3d Cir., 1978), the defendants were alleged to have refused to rent to the plaintiffs because they were Black. In that case, plaintiffs' attorney agreed to take as a fee whatever award the Court would give.

Thus, while the arrangement was technically contingent, it was not in any way as concrete as the agreement in the case at bar. From the outset, it was left to the Trial Court in *Hughes* to award fees based either on the traditional one-third contingent arrangement or on the more recently developed "lodestar" approach.

That choice was not presented to the Second Circuit in the case at bar; petitioner and his counsel had from the outset agreed to prosecute the action under the traditional percentage retainer. In short, while the Third Circuit was forced by the plaintiff to choose between two birds in the bush, the Second Circuit saw that petitioner had one bird grasped firmly in his hand. The choice was therefore obvious.

It is respectfully submitted that neither case raised by petitioner illustrates the existence of conflict among the circuits. If anything, the standards to be applied are in

essence identical; the results differ only because the facts applied to those standards differ. Opposing results reached solely because of dichotomous facts do not create a "conflict."

POINT II

The decision of the Court of Appeals in the instant case does not conflict with the Supreme Court.

Petitioner raises the specter of conflict with this Court in his petition for a writ of certiorari. Petitioner relies solely on the so-called "Newman-Northcross" rule. *See Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) and *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973).

While both of these cases were decided prior to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, the underlying rationale remains essentially unchanged. The rule of those cases provides that where a plaintiff sues as a "private attorney general," he should ordinarily be granted an award of attorney's fees. This Court specifically noted that to do otherwise in actions where damages are not recoverable would create a situation where ". . . few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." (390 U.S. at 402).

The standard to be applied under the *Newman-Northcross* line of cases was succinctly stated by the Court below:

> ". . . the principle factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful." (petitioner's brief at A-11).

As the Court noted later, the instant case is certainly not one in which counsel fees would present a significant barrier to the institution and prosecution of a suit for damages. (petitioner's brief at A-12).

It is respectfully submitted that the decision of the Court below does not conflict with the standard prescribed by the *Newman-Northcross* line of cases. If anything, the Court of Appeals applied the standard to the unique facts of the case at bar and found that it had been satisfied. Petitioner does not (and, indeed, *cannot*) demonstrate how the Court of Appeals erred in this regard.

This Court has long recognized that a Trial Court has broad discretion to award attorney's fees. *Hall* v. *Cole*, 412 U.S. 1 (1973). Respondent respectfully urges that, as long as the exercise of that discretion does not contravene the standards of the law, it should not be disturbed. In the case at bar, both the Trial Court and the Court of Appeals made determinations which were entirely consistent with existing law.

POINT III

There is no other basis on which to predicate a writ of certiorari.

A. The Effectiveness of Private Civil Rights Actions Is Not Threatened.

The intent of Congress in adopting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, is clearly indicated in the statement prefacing Senate Report No. 94-1011:

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their rights, and if those who violate the Nation's fundamental laws are not to proceed with impurity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." (S. Rep. 94-1011, 2d Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. and Admin. News 5910).

The purpose of the Act was to "remedy the anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975)." [S. Rep. 94-1011, 2d Sess. 1 (1976)]. Congress specifically indicated that the Act was designed to award reasonable fees to the prevailing party where "the rights involved are *non-pecuniary* in nature." *Id.* at 6. (emphasis supplied).

Petitioner attempts to establish that the instant case falls within one of the "anomalous gaps" which Congress sought to bridge. It is respectfully submitted that this position is untenable.

The Attorney's Fees Awards Act was designed to shift fees in civil rights cases where plaintiffs would otherwise be discouraged from enforcing their claims. As the Court below aptly noted, the case at bar does not present such a situation. (petitioner's brief at A-12).

To award fees in the present case would not foster the effectiveness of private civil rights actions. If anything, such an award would result in double punishment for the same offense. No matter how egregious respondent's acts may have been, our system of justice cannot condone such double punishment.

The denial of attorney's fees, on the other hand, does not create such inequities. Plaintiffs who sue as "private attorneys general" would still be afforded the award of attorney's fees. Similarly, those plaintiffs whose claims are "private" in nature would not be foreclosed from seeking an award of attorney's fees.

The Court below merely crystallized a necessary corollary to the stated congressional intent. If Congress adopted the Act to hurdle the financial barriers to the enforcement of meritorious claims, it stands to reason that the Act is inapplicable to cases where that barrier does not exist.

Petitioner cannot claim that he would not have brought the suit without the financial insurance provided by the Act. He knew from the outset that the price of an attorney was contingent on the outcome of the action; he willingly retained his attorney on the understanding that there would be a contingent fee. Thus, the case at bar presents a situation where the award of attorney's fees creates inequity while the denial spawns no harm. The Court below correctly recognized the factual difference of this case from those where fees were awarded. It is respectfully submitted, therefore, that the decision below in no way threatens the effectiveness of private civil rights actions.

B. The Standards Governing the Award of Attorney's Fees Do Not Require Further Elucidation.

Petitioner urges that an important question of federal law concerning the award of attorney's fees to prevailing plaintiffs remains unanswered. In essence, however, petitioner is merely requesting this Court to coalesce existing standards into a single decision. It is respectfully submitted that the case at bar does not present the appropriate vehicle with which to do this.

The standards applied in granting attorney's fees to prevailing defendants in civil rights cases are set forth in *Christiansburg Garment Co.* v. *E. E. O. C.*, —— U.S. ——, 98 S. Ct. 694 (1978). Prevailing plaintiffs, on the other hand, must look to several sources.

The prevailing party—plaintiff or defendant—qualifies for the award of attorney's fees when there is express congressional authorization or when the case falls within a limited class of exceptions. *See Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, provides the express congressional authorization required by *Alyeska*. That statute, however, merely provides the authorization. [S. Rep. 94-1011, 2d Sess. 6 (1976)]. Whether or not an award of attorney's fees is to be made at all is expressly left to the Court's discretion. (42 U.S.C. §1988).

The standards governing this discretion were prescribed long before the *Alyeska* decision required congressional authorization. *See, e.g. Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). In short, the prevailing plaintiff should ordinarily recover attorney's fees in suits brought as a "private attorney general" unless special circumstances dictated otherwise. *Id.* at 402.

The Attorney's Fees Awards Act of 1976 clarifies that one such "special circumstance" is where the relief involved is pecuniary in nature. In such cases, a determination of whether to award attorney's fees does not turn on the plaintiff's status as "private attorney general." Rather, the award of fees depends on the ability to attract competent counsel. *See* S. Rep. 94-1011, 2d Sess. 6 (1976).

In short, in cases where the relief sought is pecuniary in nature, and the "private attorney general" concept is inapplicable, the Trial Court need only determine whether the ultimate recovery would be modest in light of the time, effort and skill necessary to prosecute the claim.

The Trial Court in the instant case satisfactorily met the standard applicable to lawsuits of such nature. The Court of Appeals adequately demonstrated how that standard was met. It is respectfully submitted, therefore, that this Court need not involve itself with that which is self-evident. To do so would only lead to unnecessary repetition.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals does not conflict with the decisions of the other circuits or of this Court; further, it is respectfully urged that there are no other grounds on which to predicate a review of the case at bar. Therefore, respondent respectfully requests this Court to deny the instant petition for a writ of certiorari.

Respectfully submitted,

FRANCIS E. ZAKLUKIEWICZ
Counsel for Respondent,
William M. Perry

CURTIS, HART & ZAKLUKIEWICZ
EDWARD J. HART and
FRANCIS E. ZAKLUKIEWICZ
On the Brief